motives, and since the courts will grant him the right to inspect only when he has a substantial interest in the corporate affairs, it would seem that such a by-law as that in the principal case could serve no useful purpose.

R. T. H.

A SINGLE ACTION OR SUCCESSIVE ACTIONS FOR A NUISANCE.—A very interesting case in the law of nuisance as illustrating the difficulties courts experience in distinguishing injuries which are original and permanent from those which are continuing and intermittent is that of *Pickens* v. *Coal River Boom & Timber Co., et al.* (1909), — W. Va. —, 65 S. E. 865. The facts are as follows, plaintiff, who owned a mill situated on the Coal River, brought an action against two boom companies, the one owning and the other leasing a certain boom on the said river below his mill, to recover damages for lessening the fall of water over his dam and thus the grinding capacity of his mill by the piers and boom holding and backing up in the stream large quantities of sand and sediment. The works of the defendant were constructed properly, but after the dam and mill, and were operated without negligence. The boom companies were corporations of the state of venue chartered under what is known as the Boom Act, Laws of West Virginia, 1877, page 189, c. 121; West Virginia Code Annotated, Chapter 54A, for the purpose of erecting and operating a boom in the Coal River. This act provides for the creation of corporations for booming logs and specifies that such corporations may construct "Any boom or booms with or without piers, dam or dams, in the rivers, creeks or other streams" within certain counties, "which may be necessary for the purpose of stopping and securing boats, rafts, logs, masts, spars, lumber and other timber," except in navigable streams. The act further provides, "That nothing in this act shall be so construed as to deprive the owners of mill property, and other proprietors on the said river and branches thereof from recovering damages for injury to their property by the said corporation, their agents or employees."

This case is the last of a series of cases against these very defendants, deciding the question of the right of one whose mill or other property is injured by the construction and maintenance of a boom in a proper manner to recover for the same. *Rogers* v. *Coal River Boom & Driving Company* (1894), 39 W. Va. 272; *Rogers* v. *Same* (1895), 41 W. Va. 593; *Pickens* v. *Coal River Boom & Timber Co.* (1902), 51 W. Va. 445.

In the principal case, the court in its opinion discussed two extremely difficult and perplexing questions, first, to what extent does legislative authority to do an act, which would otherwise be an abatable nuisance, operate to shield those to whom authority is given from liability for damages for injuries suffered by others therefrom, and, second, whether the construction and injury were such as to compel the plaintiff to seek all his damages in one action, or to allow him to recover in successive actions. As there is no decided agreement of authorities on these questions, it is not strange that in a case involving both of them there should have been a difference of opinion between the judges and that a dissenting opinion should have been filed by Judge WILLIAMS.

There are numerous cases to the effect that where a private corporation constructs a work authorized by law and such work, even though it be done skillfully and without negligence, injures the property of an individual or other corporation, it is liable for the injuries, direct or consequential, thus caused. *Evansville & Crawfordsville R. R. Co.*, (1857), 9 Ind. 433; *Indiana Central Ry. Co.* v. *Boden* (1858), 10 Ind. 96; *New Albany & Salem R. R. Co.* v. *Huff, et al.* (1862), 19 Ind. 315; *Baltimore & Potomac R. R. Co.* v. *Reamy* (1847), 42 Md. 117; *King* v. *Vicksburg Ry. & Light Co.* (1906), 42 South 204, 88 Miss. 456; and, indeed, to hold otherwise would seem to authorize the "taking or damaging" of property without compensation contrary to the constitutional provisions of most states. The court discussed this question in this case, it seems, not for the purpose of determining whether a person injured by the construction of a boom, under this act, can recover, as the statute expressly so provides, but to determine whether such an injury shall be called a private nuisance and so be subject to the rules applied in the case of a nuisance to determine whether all the damages shall be recovered in one action or in successive actions. The difficulties of the case might have been lessened had the court considered whether the boom in this case were an *abatable* nuisance. As it was constructed under authority of law and without negligence and operated in a proper manner, it seems it should not have been so regarded.

The second question, *i. e.*, whether the damages present and prospective should be recovered in one or in successive actions, occupied the larger share of the court's attention. The authorities on this subject are confused and seemingly irreconcilable. The confusion has arisen as Judge WEAVER says in *Harvey* v. *Mason & F. D. R. Co.*, 129 Iowa 465, "not so much from the statement of governing principles as from the inherent difficulty in clearly distinguishing injuries which are original and permanent from those which are continuing and in assigning each particular case to its appropriate class." Different courts have suggested different tests to determine whether in cases of this sort all the damages both present and prospective should be recovered in one action or successive actions should be brought to recover the damages as they accrue. Each one of these tests has something to recommend it, no doubt, but no one of them seems better than that suggested by Judge BELL in his opinion in the case of *Troy* v. *Cheshire R. R. Co.* (1851), 23 N. H. 83, in which after suggesting that two things are to be considered in determining the damages caused by a nuisance, (1) whether the structure producing the injury is permanent, and (2) whether the injury is continuous and permanent or only temporary or intermittent, he says, "Whenever the nuisance is of such a character, that its continuance is necessarily an injury, and where it is of a permanent character that will continue without change for any cause but human labor, then, the damage is an original damage, and may be at once fully compensated. * * * But where the continuance of such act is not necessarily injurious, and where it is necessarily of a permanent character, but may, or may not be, injurious, or may, or may not be, continued, then the injury to be compensated in a suit, is only the damage that has happened." Applying this test to the facts in the principal case, it seems that all the dam-

ages suffered by the plaintiff should have been recovered in one action. The boom certainly should be looked upon as a "permanent structure" as that term is used in the law of nuisance and the injury seems continuous and as permanent as the dam, since according to the plaintiff's own testimony the water commenced backing on him as soon as the defendant began operating the boom. Many cases seem to sanction this view. *Powers* v. *Council Bluffs* (1877), 45 Iowa 652; *Powers v. St. L. etc. Ry. Co.* (1900), 158 Mo. 87; *Ridley* v. *Seaboard & Roanoke R. R. Co.* (1896), 118 N. C. 996; *Beatrice Gas Co.* v. *Thomas* (1894), 41 Neb. 662, 39 N. W. Rep. 925, 43 Am. St. Rep. 711; *Illinois Central R. R. Co.* v. *Lockard* (1903), 112 Ill. App. 423; *Illinois Central R. R. Co.* v. *Ferrell* (1902), 108 Ill. App. 659. Judge WILLIAMS in his dissenting opinion, in the principal case, favored the application of this rule, while the majority opinion opposed it. W. G. S.

STATUS OF ONE HOLDING OFFICE UNDER AN UNCONSTITUTIONAL STATUTE.—Poulin, having been indicted and found guilty of selling intoxicating liquors, moved in arrest of judgment, alleging in support of the motion that an attorney appointed to fill the office of special attorney, created under an unconstitutional statute, assisted, counseled, and advised the grand jury as a prosecuting attorney is required to do in the performance of his official duties in criminal cases. The motion was overruled on the ground that the special attorney was a de facto officer, although the law creating the office was unconstitutional. *State* v. *Poulin* (1909), — Me. —, 74 Atl. 119.

The term "officer" necessarily implies the existence of an office. It is laid down, not without vigorous dissent, that there can not be an office de facto under a constitutional government, and more particularly, there can not be an office de facto or de jure created by an unconstitutional law. MECHEM, PUB. OFF., §§324, 325; THROOP, PUB. OFF., §638ff; DILLON, MUN. CORP., §276; 29 CYC., 1391; *Hildreth* v. *McIntire*, 1 J. J. Marsh (Ky.). 206, 19 Am. Dec. 61; *Norton* v. *Shelby County* (1886), 118 U. S. 425; *People* v. *Knopf*, 183 Ill. 410; *Town of Decorah* v. *Bullis*, 25 Iowa 12; *In re Norton*, 64 Kan. 842; *Carleton* v. *People*, 10 Mich. 250; *State* v. *O'Brian*, 68 Mo. 153; *In re Quinn*, 152 N. Y. 89; *Ex Parte Bassitt*, 90 Va. 679; *Herrington* v. *The State*, 103 Ga. 318; *Yorty* v. *Paine*, 62 Wis. 154; *Clark* v. *Inhabitants of Easton*, 146 Mass. 43; *Ruohs* v. *Athens*, 91 Tenn. 20; *People* v. *Toal*, 85 Cal. 333; *Gorman* v. *People*, 17 Colo. 596. Contra, *Burt* v. *Winona etc. Ry Co.*, 31 Minn. 472; *State* v. *Gardner*, 54 Ohio St. 24; *Donough* v. *Dewey*, 82 Mich. 309; *Lang* v. *Bayonne* (1907), 74 N. J. Law 455, 6 MICH L. REV. 354; *State* v. *Bailey* (1908), 106 Minn. 138; and see, *Speer* v. *Kearney County*, 88 Fed. 749.

Norton v. *Shelby County*, supra, is the leading case to the effect that there can not be an officer de facto where the office is created by an unconstitutional statute. Mr. JUSTICE FIELD says: "But the idea of an officer implies the existence of an office which he holds. * * * Their [counsels'] position is, that a legislative act though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. * * * An unconstitutional act is